No. 14,431

IN THE

United States Court of Appeals

For the Ninth Circuit

S. H. P. VEVELSTAD, WILLIAM L. PAPE, and AURORA NICKEL COMPANY, a corporation,

Appellants,

vs.

E. MILES FLYNN,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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Table of Authorities Cited

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellants ask for rehearing because they believe the Court in its Opinion of January 13, 1956, overlooked several salient meritorious points presented by Appellants' Appeal or else did not give those points such consideration as they were entitled to under the law and the evidence of the case.

I.

The Appellants consist of three different defendants: the individuals S. H. P. Vevelstad and William Pape, and the corporation Aurora Nickel Company. The latter was the owner (PR 68) at the time of the

trial of the mining claims against which Appellee seeks to quiet his alleged title. The Judgment ran against all three appellants (PR 119).

The record contains no evidence that either Vevelstad or the Aurora Nickel Company procured the absence of Pape, which is an essential element under Rule 26(d)(3)(2), FRCP.

The record is also bare of evidence that either Vevelstad or Aurora Nickel Company had opportunity to subpoena Pape. Appellee admitted that Vevelstad would testify that he and Aurora Nickel Company did not procure Pape's absence and that Appellee had no testimony to contradict that evidence (PR 342). These facts are also persuasive that the trial Court abused its discretion in denying Appellants' request that decision be deferred until Pape's testimony could be obtained, the granting whereof was clearly authorized under Rule 52, FRCP.

Hernberg v. Tipton, 133 F2d 67, 69 (CCA, Ill. 1943);

George v. Lyons, 110 F.Supp. 711, 713, 14 Alaska, 241, 244.

Thus Appellants and Aurora Nickel Company, although innocent of Pape's absence, were deprived of an opportunity to adduce Pape's evidence (PR 109-112) in support of their interests (PR 68, 71).

II.

The Judgment (PR 119-122), which has been affirmed, entirely ignored the trial Court's finding in its Opinion that the descriptions of Appellants' three

Beach Claims were sufficient (PR 101); but, quieted Appellee's title as against all of Appellants' claims including those three claims (inasmuch as the Judgment did not except them), with which Appellee admitted his claims conflicted (PR 290).

While the trial Court found the description of the three Beach claims to be sufficient, yet it held them with Appellants' other claims to have been vacant, unappropriated, and open to location by Appellee in October and November, 1952 (PR 103-104). [Appellants' claims numbered 27 (PR 68), not 26 (PR 104).]

Patently the trial Court's reasoning and finding was erroneous in sustaining Appellee's first contention as to Appellants' three Beach claims (PR 103-104; 99).

III.

The trial Court held that Appellants' assessment work was invalid because done outside the claims purportedly for the benefit of non-contiguous claims (PR 104). The only assessment work required to be done by Appellants to maintain the validity of their claims, which were located in October, 1950, as against Appellee's claims which allegedly were located in October or November, 1952, was for the assessment year ending at noon of July 1, 1952.

Trail work is valid assessment work.

Morrison's Mining Rights, 16th Ed., p. 115.

> "The kind or character of work is immaterial if it be of sufficient value and done in good faith

and tends to develop the claim. It may even be outside the boundaries of the claim; a road or trail, required for the purpose of working the claim, though outside the lines of location, would constitute representation to the extent of the value necessarily contributed towards its construction by the locator."

Emery's Miners Manual, 2d Ed., p. 49;
Walton v. Wild Goose Mining Co., 123 F. 209;
Anvil Hydraulic, etc. Co. v. Code, 182 F. 205.

The cited evidence also shows other work done for that assessment year.

The record is replete with uncontradicted evidence that both Appellee and Appellants used that trail in order to gain access to Bohemia Basin. Pape's deposition, Exhibit D (PR 382-393), would have shown, had it been admitted in evidence, the amount of trail work he did for the assessment year ending at noon July 1, 1952. His verified proof of labor dated July 8, 1952, Defendants' Exhibit F, which is prima facie evidence under Sec. 47-3-55, ACLA 1949, of the performance of the work or of the making of the improvements therein stated, shows the assessment work he did for the assessment year ending at noon July 1, 1952. While some of this trail work was done outside the claims, all of it was necessarily done, necessarily all of it benefited all of the claims, and was reasonably calculated to lead to the extraction of ore.

Appellants' Exhibit H is also prima facie evidence of the performance of the work done and of the making of the improvements therein stated for the assessment year ending noon July 1, 1953.

IV.

While the trial Court stated that the descriptions in Appellee's location notices were such as to make doubtful whether they were sufficient, yet it held that the question of the sufficiency of those descriptions was really not involved because such objection is available only to a subsequent locator, citing *J. E. Riley Inv. Co. v. Sakow,* 9 Alaska 427, 434, 110 F2d 345.

The *Riley v. Sakow* decision was based upon Chapter 10, Session Laws of Alaska 1915, which was repealed by Chapter 64, Session Laws of Alaska 1931. Appellants submit that the lower Court therein did not hold that under that act abandonment or forfeiture could be asserted only by a subsequent locator or by a relocator but simply said that the 1915 legislature made abandonment nothing more than a defense. This Honorable Court in 110 F2d 345 did not pass upon this point.

Furthermore, a placer claim was involved in the *Riley v. Sakow* case, whereas here lode claims are involved. That decision was based upon Section 2 of Chapter 10, SLA 1915, which pertained to placer claims only. Sections 10 to 15 of that act pertaining to lode claims did not contain the same provisions as those pertaining to placer claims, but Section 15 did provide that a locator or claimant might amend his location, and Section 21 specifically provided that, should the locator fail to comply with any of the provisions of Sections 10 to 21 of the act, the burden of proof would be upon him to show compliance with the provisions of said sections.

While some technical distinction may exist between an amended location and a relocation—(This Honorable Court in its Opinion even referred to Appellants' June, 1953, locations as relocations by saying "As defendants purportedly relocated 20 of their claims on various days in June, 1953, filing amended location certificates July 6, 1953")—yet it is not such as to justify the harsh construction given by the trial Court following a decision based upon a statute long since repealed.

The mining laws of the United States covered the claims involved in this case, under Title 48 USCA 381, including the local territorial provisions as to location of a lode claim (§47-3-31, ACLA 1949) and recording of a certificate of location (§47-3-33, ACLA 1949) and the provisions of §47-3-34, ACLA 1949, which reads:

> "§47-3-34. Amended locations: Amendment of notices and change of locations: Filing amended certificate of location. Notices may be amended at any time and monuments changed to correspond with the amended location but no change shall be made which will interfere with the rights of others. Whenever monuments are changed or an error has been made in the notice or in the Certificate of Location, an amended Certificate of Location shall be filed for record in like manner and with like effect as the original Certificate. (L 1933, ch 83, §5, p. 162; CLA 1933, §358.)"

Appellants admit that amended locations cannot be made to interfere with or injure the intervening right of another nor can a relocation; but, they submit that

in defense of their amended claims they had the right to show that the intervening person (Appellee) had no valid right, which Appellants sought to do by showing and proving that Appellee's claims were not located nor Certificates of Location thereof made as required by the foregoing statutes.

In June, 1953, as shown by Appellants' Exhibit J, the Appellant Aurora Nickel Company made amended Certificates of Location of the Rita 1, Rita 2, Rita 3, and Rita 4, Doris 1 and Doris 2, and Hope 1, Hope 2, Hope 3, Hope 4, Hope 5, Hope 6, Hope 7, Hope 8, Hope 9, Hope 10, Hope 11, and Hope 12, Sverre, and Sverre No. 2, and located Sverre No. 3 (PR 544) constituting 21 of the 27 claims owned by Appellant Aurora Nickel Company.

Despite these amended Certificates of Location, including one original Certificate of Location, the trial Court by its Opinion (PR 97-106) and its Judgment (PR 119-122) quieted Appellee's title as against all of them upon the theory that their descriptions were insufficient and that their amended locations gave them no standing to show the defects in Appellee's locations and purported Certificates of Location.

V.

In denying Appellants' motion for new trial (PR 107-109) the trial Court entirely ignored the newly discovered evidence disclosed by Peter Brown's Affidavit (PR 113-114) and John Breseman's Affidavits (PR 114, and PR 116-118). No contradiction was made that these facts were newly discovered. The

rules specifically authorize a new trial upon the ground of newly discovered evidence. Rule 59(a), FRCP.

Appellants believe this Honorable Court in its Opinion overlooked the merits of their motion for new trial, and that Breseman's testimony might well have changed the result of the trial.

Tracy v. Terminal R., etc., 170 F2d 635;
Murdock v. U. S., 160 F2d 358;
Sulzbacher v. Continental Casualty Co., 88 F2d 122.

VI.

The entire tenor of the trial Court's Opinion (PR 97-106) shows that contrary to law it placed the burden of proof upon the Appellants instead of upon the Appellee.

While the trial Court first set forth plaintiff's contentions (PR 99) he did so seemingly only for the purpose of then considering and disposing of Appellants' defense or title; in fact, after having disposed of Appellants' claims he then continued that the next question for determination is the validity of Appellee's 45 claims (PR 104) and proceeded, as stated, to hold that Appellants could not attack Appellee's claims for insufficiency of description because such objection was not available to Appellants (PR 105).

The authorities are unanimous that the burden of proof was upon Appellee, not upon Appellants; in fact, Appellee having failed to prove a valid title,

actually made it unnecessary for Appellants to offer any defense whatsoever.

Patton on Titles, p. 917.

Appellants' Brief, p. 81.

VII.

Appellants urge that their testimony as to the damages they suffered by reason of Appellee's acts was not wholly frivolous and wanting in substance. We submit that Appellant Vevelstad's testimony was neither frivolous nor insubstantial. He stated that the United States Government through the National Production Authority on October 14, 1952, was ready to finance a plant and that they were waiting now to move in, and that under that Authority he could have put in a plant to mine and concentrate the ore, which would have been shipped south in the form of concentrates, and that he had people ready to proceed under the National Certificate of Authority but that Appellee's actions had clouded Appellants' title and the people quit, and that the plant would earn annually $60,000,000 per year, of which his share alone would be around $8,000,000 annually in addition to 25% of the profits and that he was dealing with one of the biggest engineering firms in the United States and that he had an agreement in October, 1952; also that he based his exemplary damages upon the principle that punitive damages for violations of the Anti-Trust Law were computed at three times the actual damages (PR 545-550), also that on July 10, 1952, an engineer representing buyers investigated the property (PR 573).

None of this testimony was contradicted. It was ample and good proof of the amount of damages in accordance with Rule 8(d) FRCP, which had not even been denied by pleading. Appellants again urge that their counterclaim was a compulsory counterclaim under Rule 13(a) and arose out of the transaction or occurrence that is the subject matter of Appellee's claim (Amended Complaint, PR 53-61), and had they not pleaded it herein they would have been precluded from doing so in an independent action.

Lesnik v. Public Industrials Corporation, 144 F2d 968 (CCA NY 1944);

Penn. R. Co. v. Musante-Hillips, Inc., 42 F. Supp. 340 (DC Cal. 1941).

Appellants submit that their Counterclaim denominated as such required a Reply, Rule 7(a), supra, or else stands admitted under Rule 8(d).

U. S. v. Hole, 38 F.Supp. 600 (DC Mont. 1941);

Porter v. Theo J. Ely Mfg. Co., 5 FRD 317, (DC Pa. 1946);

Sun-Maid, etc., Assn. v. Neustadter Bros., 115 F2d 126, 127 (CCA Cal.);

Peters & Russell v. Dorfman, 188 F2d 711, 713, (USCA 7).

VIII.

While Appellants realize that under the United States mining laws a lode claim is subject to no specific dimensional qualifications other than it must not extend along the lode for more than 1500 feet or more than 300 feet on each side of the lode, with end

lines at right angles to the lode line and parallel to each other, yet they submit that the evidence clearly shows that Appellee's claims were not located according to those requirements, and could not possibly have had common side lines or common end lines or constituted a block around which one perimeter could be run because they were staggered as shown in Appellants' Exhibit L, an illustrative map made by Mining Engineer Richelsen, who stated he had made his illustrative map from Appellee Flynn's Answer (Appellants' Exhibit B), to Appellants' Interrogatory No. 9 (PR 22-25).

Witness Arthur Hofstad testified somewhat indefinitely on the subject (PR 502). Witness Arnold Hofstad testified that the notices were all placed very close together, and that he would say within a distance of 2,000 feet he encountered at least four notices, and he had the impression that they were parallel to the rim and his recollection was that they were either Norpa's or Flynn's notices (PR 488-491). Appellant Vevelstad testified that he found eight of Flynn's notices bunched together in a string 1400 feet long, that they were staggered notices (PR 525-526), and that with a heavy trolling line he measured eight claims and they actually covered 1400 feet (PR 538-540); and that Appellee's claims only had a discovery post, no end or corner posts.

IX.

Appellants respectfully urge that, if the Appellee's Pelican No. 30 Mining Claim's description of

"50 feet east of the mouth of Bohemia Creek" is sufficient (Op. herein, p. 8), necessarily a description of "2 miles westerly from the mouth of Bohemia Creek and Tidewater" is equally sufficient.

Appellants' 17 locations (Exhibit E) are all, with the exceptions hereinafter noted, tied in not only by distance and course from the mouth of Bohemia Creek, but also from Tidewater, and furthermore are tied in by distance and course from the Miner Island.

The word "line" in the location notice would not confuse any person, because a sight on "Miner Island" would show any intelligent person that the course ran from Miner Island. A line on Miner Island would necessarily lead to a course from Miner Island.

Exceptions: Rita No. 1 notice does not state the distance from Miner Island line. Hope Nos. 1, 2 (word "line" not in notice), 3, 4, 5, and 6 do not state the compass course from the mouth of Bohemia Creek and Tidewater. However, for example Hope No. 1, a line projected 4 miles southerly from Miner Island would necessarily intersect, when it reached a point 2½ miles distant from the mouth of Bohemia Creek and Tidewater, a line projected westerly from the mouth of Bohemia Creek and Tidewater.

Appellants submit that the stated courses given in those notices would govern and cure ambiguous courses under general principles of construction of descriptions in conveyances.

Steen v. Wild Goose M. Co., 1 Alaska 255, 266;
Sec. 58-7-3, ACLA 1949;
Lindley on Mines, 3rd Ed., Vol. 2, §§ 381, 382.

Appellants further urge that Exhibits K, 1, 6, and 7 don't control either Appellants' or Appellee's notices, but that the descriptions in the notices control those maps, and that the description in Appellants' Hope No. 10 claim, despite Richelsen's testimony (PR 457), is precise, and is more precise than that of Appellee's Pelican No. 30 claim, and that he was correct when he stated (PR 440) the claims were platted on Exhibit K from the location notices.

The variation of a course from a particular discovery post would not make the description insufficient. Such requirement would require a prospector to make an accurate survey before he could locate his claim. Appellants don't have available copies of Appellee's notices, except Mayflower No. 2 and Portia No. 3 (Exhibit 2) and Pelican No. 26 (Exhibit 3), each of which shows a specified distance by a general compass direction from Bohemia Basin Camp of the claim itself, not of any particular post or part of the claim. Appellants' recollection is that Appellee's other descriptions are so tied in. The description of Pelican No. 30 as "located 50 feet east of the mouth of Bohemia Creek" (This Court's Op. p. 8) indicates a similar general description.

Five of Appellants' locations (Exhibit I) are described by course and distance not only from Rock Point light, a U. S. Coast & Geodetic Survey navigational aid, but also from the north side entrance of Stag Bay; one by course and distance not only from Miner Island but also from the mouth of Bohemia Creek; three by course and distance not only from

the Rock Point light but also from the mouth of Bohemia Creek.

The Original notices (Exhibit J) are on file with this Honorable Court, but Appellants' records show that 20 of them are described by course and distance not only from the tunnel (Picture shown in Exhibit O, which Vevelstad identified [PR 697-698], the tunnel being on the Hope group [PR 536]), on east side of Bohemia Valley but also from the outflow of Bohemia Creek in Lisianski Straits, except four of them state the claim is on top of Takanis Mountain and describe the tunnel as being on the Hope Nickel group instead of on the east side of Bohemia Valley but they also tie in by course and distance from the outflow of Bohemia Creek.

Appellants submit that lines projected according to these descriptions would intersect the claims.

Appellants do not have available a copy of Sverre No. 3 original certificate of location so make no comment relative thereto.

X.

Johnson, the man who testified he met Pape and a man with an ax (PR 586), was not a U. S. mineral or land surveyor (PR 174-175). He said he was on the ground in May and June, 1953, merely making observation of claims and taking pictures (PR 184), when snow conditions made travel dangerous (PR 205-207). Harrigan also testified as to snow conditions in May, 1953. While stating there was some 12 to 14 inches of snow around the cabin (PR 675),

Vevelstad testified that Harrigan told him there was 5 feet of snow around the cabin (PR 698). Appellants' Exhibits N and O show the timbered, mountainous terrain of Bohemia Basin (PR 696-698). Vevelstad described it as the toughest country in the world (PR 528-529). Appellants submit that this Honorable Court can take judicial notice of Yakobi Island's topography, geography and terrain. These all disclose how little observation Johnson could have done in the few days he was on the Island in May, 1953, of posts and monuments. Nor does the record disclose, as Appellants recall, any evidence that plywood employee Klein examined any blazes which were identified as having been made by Pape.

Johnson himself did not make the map, Exhibit 1 (PR 166); in fact, he admitted he hadn't seen it until the morning he testified (PR 187). It was not complete (PR 188).

He stated that the claim descriptions were not placed on that map according to the location (notice), but according to survey (PR 193). He said those locations were not amended (PR 193-194). Appellee offered in evidence only one set of location notices, which under Johnson's testimony are not the claims on the ground.

Furthermore, Appellee's claims do not give their width, and the claimed discovery was not within the claim but on the end line. Vide: Notices location Mayflower No. 2 and Portia No. 3 (Exhibit 2) and Pelican No. 26 (Exhibit 3).

The language "discovered, located and claimed 1500 feet, horizontal measurement of, on and along the lode or vein . . ., with 300 feet of surface ground on each side of the center line of said claim," does not denote that the claim is any particular distance in either length or width. If it does, nothing is accomplished by later stating in a notice that the claim extends 1500 feet in some stated direction each way from discovery.

Appellee's sworn Answer (PR 22-25) (Exhibit B, PR 308) tried to avoid the plain fact stated in his location notices by testifying that in many of his claims discovery was immediately adjacent to the center end post. He said discovery on Mayflower No. 2 was about 5 feet Southeast of the northwest center end post. Mayflower No. 2 location notice (Appellants' Bf. Appen. p. 78) states the claim extended 1500 feet northwest from the discovery monument. Hence, if his notice is correct, then his sworn answer is incorrect. In the notice the claim runs 1500 feet northwest from discovery. If his sworn answer is correct, then the notice is incorrect because, if 1500 feet long, it must have run 1495 feet southeast and 5 feet northwest from discovery, whereas it says it runs 1500 feet northwest from discovery. If the claim ran 1500 feet northwest from discovery, and discovery was at the point indicated by Appellee's sworn answer, then the claim extended 1495 feet further to the northwest than indicated by the notice, and 1495 feet of open ground exists which throws off that entire line of claims. Both sworn answer and notice can't be correct.

Therefore, Appellee failed to prove his case because at the time of the trial he had recorded neither notices nor certificates of location correctly describing his claims as required by Sec. 47-3-31 and Sec. 47-3-33, ACLA 1949.

Sec. 47-3-33, ACLA 1949, also provides that failure to record a certificate of location within 90 days of posting location constitutes an abandonment.

This Honorable Court's construction of the former law, Sec. 2, Ch. 10, SLA 1915, should be applied here.

> *Veedin v. McConnell,* 5 AFR 394, 401, 22 F2d 753.

Inasmuch as Appellee thereby failed to sustain the burden of proof as to his title and to prove that he had located his claims in accordance with Sec. 47-3-31 and 47-3-33, ACLA 1949, it is immaterial in this action whether Appellants did not blaze or mark until 1953, which they do not concede, the boundaries of their claims.

Because, the requisite acts of locating a mining claim need not be done at any specified time but can be done at any time prior to another's obtaining rights to the ground embraced in the claim.

> "The failure to perform any of the given acts within the time limited by the laws or local rules may subject the ground to relocation; but, if the requirements are complied with prior to the acquisition of any intervening rights, no one has a right to complain."
>
> Lindley on Mines, 3d Ed., Vol. 2, p. 755, §330; *Reeden v. Harlan,* 2 Alaska 402, 404.

The only materiality herein of Appellants' failure to properly locate their claims prior to October and November, 1952, which as stated they do not concede, is that they are required to establish good title to their claims before they can recover damages from Appellee on their Compulsory Counterclaim and if they do not so establish it they cannot recover those damages.

Dated, Juneau, Alaska,
February 20, 1956.

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and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay and that it is meritorious because this Honorable Court in its Opinion of January 13, 1956, inadvertently overlooked principles of law applicable to this proceeding as well as pertinent evidence disclosed by the record herein.

Dated, Juneau, Alaska,
February 20, 1956.

R. E. ROBERTSON,
Of Counsel for Petitioning Appellants.